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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 503

THOMAS L. "JACK" SPIERS,
Petitioner,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

T. J. Wills,
Henry Mounger,
R. G. Wooton,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

Thomas L. "Jack" Spiers, through his attorneys, prays that a writ of certiorari issue to the United States Emergency Court of Appeals, directing it to send up the record in the above entitled cause, to be reviewed by this court and such order entered therein as may appear from the record in the case to be mete and proper.

Jurisdiction

The judgment of the United States Emergency Court of Appeals was entered on August 29, 1945, and the petition for rehearing was entered on September 19, 1945. The jurisdiction of this court is predicated upon the Federal

Statute, section 924 (d) Title 50, Appendix of the United States Code Annotated, and section 240 of the Judicial Code, as amended.

History of the Case

Mississippi has statutory prohibition. The sale of intoxicating liquor is prohibited in the State of Mississippi and all property rights in intoxicating liquors is abrogated by the statute. Section 2618 Mississippi Code 1942.

By the 21st amendment to the Constitution of the United States, the transportation or importation into any state or territory or possession of the United States for delivery or use therein, of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. The Congress of the United States, in carrying into effect the obligation imposed upon the Federal Government by the provisions of the 21st amendment, enacted the liquor enforcement act of 1936, 27 U. S. C. A., paragraph 221 *et sequa*.

Under the Emergency Price Control Act a ceiling price was placed on whiskey. The petitioner herein is charged with violating the O.P.A. Administrator's ceiling price promulgated on the sale of whiskey in the State of Mississippi. Petitioner challenges the right of the Administrator to extend a ceiling price on the sale of whiskey in the State of Mississippi. He filed a protest with the Administrator, protesting the extension of the ceiling price on whiskey to the State of Mississippi. The Administrator overruled his protest. The case was appealed to the Emergency Court of Appeals, and by a divided court the opinion of the Administrator was affirmed.

Mississippi, being a dry state, and in the light of the duties imposed upon the national government by the 21st amendment to the Constitution, can the Congress authorize the Administrator, and can the Administrator, either by authorization of Congress or the inherent rights under the

war powers, override the Federal Constitution, the Federal Laws and the laws of the State of Mississippi and extend a ceiling price on whiskey to sales made in Mississippi?

It is the contention of the petitioner herein that the ceiling price cannot be extended to the sales of whiskey in Mississippi. The Emergency Court of Appeals says:

> "Before discussing the arguments of complainants, and at the outset of our consideration of the legal proposition submitted for determination, it should be stated that pursuant to the Twenty-First Amendment to the Federal Constitution, the State of Mississippi has enacted laws prohibiting the sale, importation, manufacture or use of intoxicating liquors for beverage purposes, and has declared that all property rights in such liquors were abolished."

It is the contention of petitioner that the court failed to grasp the scope of the 21st amendment and the liquor enforcement duty of the United States. The prohibition laws enacted by the State of Mississippi were not enacted pursuant to the 21st amendment to the Federal Constitution. They were prohibition laws enacted by the State of Mississippi as a sovereign state. The laws of the State of Mississippi will show that prohibition laws in Mississippi were enacted and really enforced long prior to the adoption of the 18th amendment. That in the adoption of the 18th amendment the State of Mississippi yielded her sovereign power to the United States Government.

When the 18th amendment was repealed and the delegated powers exercised thereunder, by the National Government, were revested in the states, the State of Mississippi continued her prohibition laws. Mississippi, as a sovereign state, looked to and expected the National Government to perform the imposed duties contained in the 21st amendment.

The misconception of the Emergency Court of the whole scheme of prohibition in the State of Mississippi, as reflected in the quoted paragraph from the opinion, *supra,* is reflected throughout the opinion. When analyzed the extent to which the court has missed the true application of the Constitution becomes apparent.

It is the contention of petitioner that the prohibition of the importation of intoxicating liquors into Mississippi is as imperative upon the National Government as the waging of a defensive war against an attacking foe.

The statement is made in the opinion that if the contention we make was adopted that a noncompliance with the statutes and ordinances regulating sales of commodities, such as Sunday sales, sales without the required license or sales of certain drugs without a doctor's prescription and the like, would confer immunity from price control upon persons making sales in violation of the provisions of the Emergency Price Control Act.

The court overlooked the fact that noncompliance with the state statutes and ordinances is the transgression of the individual citizen, and the law or ordinance transgressed is the mandate of a sovereign power, whereas in the case at bar the placing of a price control on the sale of a commodity that is prohibited by federal and state law, is the transgression and violation of a duty imposed upon the Sovereign itself. This is the wrong of the Sovereign and not of the subject.

It is true that there is an old tradition that "the King can do no wrong." To excuse and justify many acts of state we have, in this Republic, been pleased to quote the tradition and apply it to the Sovereign will of the American people. That tradition, however, is wrong. Right and Justice is eternal. It is as immutable as the laws of gravity. When a duty rests upon the Sovereign power to do or not to do a specific thing, its failure to

discharge that duty is a wrong. It is as much the duty of the Federal Government to marshal the armed forces of this great Republic to the extent that may be necessary to repel the invading bootlegger, bringing intoxicating liquors into the State of Mississippi, as it is its duty to marshall the armed forces and the resources of this country to repel an invading foe. When they do that; when the Government recognized that it is its duty to do that, a ceiling price or price regulation on the sale of intoxicating liquors cannot be extended to sales made in the State of Mississippi, a dry State.

We respectfully submit to the court that the opinion in chief, in this case, is wrong. That the opinion of the Chief Judge, in dissenting, is right. The dissenting opinion does not go as comprehensively into the question and into the analysis of the reasons why it cannot be extended as we would wish. The dissenting opinion, however, is on the right road and should be made the controlling opinion in this case.

For the reasons set forth we respectfully petition this court to issue a writ of certiorari directed to the United States Emergency Court of Appeals to send up the record and that this court, on review, should reverse its decision.

Respectfully submitted,

T. J. Wills,
Henry Mounger,
R. G. Wooton,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

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CHESTER BOWLES, PRICE ADMINISTRATOR

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

May it please the Court:

This case presents the question whether under the war powers of the Constitution of the United States the Congress has the power to extend a maximum price on the sale of whiskey sold in Mississippi in violation of the laws of the State; and whether or not the Congress attempted to delegate the power to the Price Administrator to control and fix the maximum price on the sale of whiskey in the State.

By section 2613 of the Mississippi 1942 Code it is made unlawful to keep, have in possession, barter or give away intoxicating liquors. By section 2618 of the Mississippi 1942 Code it is provided that no property right shall exist in any person, natural or artificial, or be vested in them, in any intoxicating liquors or intoxicating drinks pro-

hibited by this chapter from being manufactured or distilled, or sold, or possessed, nor shall any property right exist in such person, of stills, furnitures, fixtures, vehicles, automobiles or other motor power, means of transportation, etc.

By the 18th amendment to the Constitution of the United States the States delegated to the National Government the power to prohibit the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States or territory subject to the jurisdiction thereof. This was a delegation of the Sovereign power of the States to the National Government of the right to control the sale or transportation of intoxicating liquors with the duty to prohibit the manufacture and sale thereof.

Thereafter the Sovereign States of the Union withdrew from the National Government the delegated authority to control the manufacture and sale of intoxicating liquors and revested it, by section 1 of the 21st amendment to the Constitution of the United States, in the States. By section 2 of the said amendment the States imposed upon the National Government and the National Government assumed the responsibility of the duty to prevent the transportation or importation into any state, territory or possession of the United States for delivery or use thereby of intoxicating liquors, in violation of the laws thereof.

In withdrawing from the National Government the powers and authority so delegated to it, as a part of the organic law granted in the 18th amendment, the States placed upon the National Government the imperative duty of prohibiting the transportation or importation of intoxicating liquors into a state, in violation of the laws of that particular state.

By article 1, paragraph 8, section 11 of the Constitution of the United States, the Sovereign States granted or dele-

gated to the National Government the power to declare war, grant letters of marque and reprisal and make rules concerning captures on lnad and water.

By section 12 they gave to the National Government the power to raise and support armies.

By section 13 they gave it the power to provide and maintain a navy.

By section 14 the power to make rules for the Government and regulations of land and naval forces.

By section 15 the power to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions.

Article 1 section 8 specifically starts by saying that the Congress shall have all power. We call the Court's attention, with emphasis, to the fact that the war powers are granted powers and not imposed duties.

The distinction that we make here and as we believe is controlling in this case, that the States granted to the National Government the war powers, which may be necessary in the waging of a war, to be exercised. A granted power carries with it the right of exercise of the volition of the Sovereign to which they are granted. In other words when the Constitution says the Congress shall have the power, being the first expression under article 1 section 8, it means and must be interpreted that the Congress has the volition, upon due consideration, to act or not to act, there being no duty of action contrary to the deliberate conclusions reached by the Congress assembled.

In article 2 of the 21st amendment, in withdrawing from the National Government the duties that had been imposed by the 18th amendment, the States imposed the duty of prohibiting the transportation or importation of intoxicating liquors into any State in violation of the laws thereof.

The language of this amendment shows clearly that the Sovereign States had not, by the said 21st amendment,

delegated to the National Government any powers whatsoever. The provision of the Amendment imposed upon the National Government the duty of prohibiting the violations of the State statutes.

A duty, as we understand it, imposed upon the National Government, by the Constitutional provision, expressed the deliberate decision as the volition of the Sovereign States themselves. The National Government did not have it within its privilege to determine to act or not to act, but the duty of action was imperative. A change of the mandate of the Sovereign States in a Constitutional amendment to the Constitution of the United States is the only way the National Government can be relieved of the duty so imposed.

Acting under the war powers, which was a grant of power to the National Government, where it could, in the exercise of its volition, act or refrain from acting, the Emergency Price Control Statutes were enacted. An Administrator, clothed with the power of the Sovereign itself, was set up, to fix maximum prices under the powers so granted. To extend the price regulation, into a state, upon articles prohibited from being held, owned or brought into the State, would bring the powers thus exercised in conflict with the duties solemnly imposed.

The question we are asking this Court to decide, is whether or not the National Government can sweep aside the duties, that have been imposed upon it by the Sovereign States, in the exercise of the powers that had been granted to it by the States, when the powers so granted and the duties so imposed, come in conflict one with the other.

In other words, can the National Government, in breach of its duty, claim to act under a delegated power in conflict with a solemn duty and successfully assert that it had the right to overturn the solemn decision of the Sovereign States imposing a duty, in its exercise of the powers that those same States had granted it?

Without, in this brief, discussing in any wise the question of whether the National Defense and National Security could be promoted by the control of the sale and consumption of intoxicating liquors, we present the question, which is the more binding upon the National Government, powers granted or duties imposed.

The National Government, through its enforcement agencies, could dry Mississippi, with respect to intoxicating liquors, within a week's time, as dry as the Sahara desert is of water. There was never any occasion for the extension of a maximum price on whiskey into the territory of Mississippi, a dry state.

If the National Government could repel the invasions of the Japanese Empire, and her allies, and prevent them from landing on the Pacific coast, much more easily could it have prevented the landing of intoxicating liquors on Mississippi's soil.

We submit to the Court that the question presented is, must the Government perform its duties, imposed and solemnly assumed, or can it brush them aside and say that in an effort to aid the law enforcement they placed a ceiling price on intoxicating liquors and thereby make for another regulation, a law and penalty to be imposed for its violation.

We respectfully submit that the opinion rendered in this case is erroneous. That the dissenting opinion is in line with the law, controlling and that the petition for a writ of certiorari should be granted and that the Court should reverse the United States Emergency Court of Appeals' opinion rendered herein.

Respectfully submitted,

T. J. Wills,
Henry Mounger,
R. G. Wooton,
Counsel for Petitioner.

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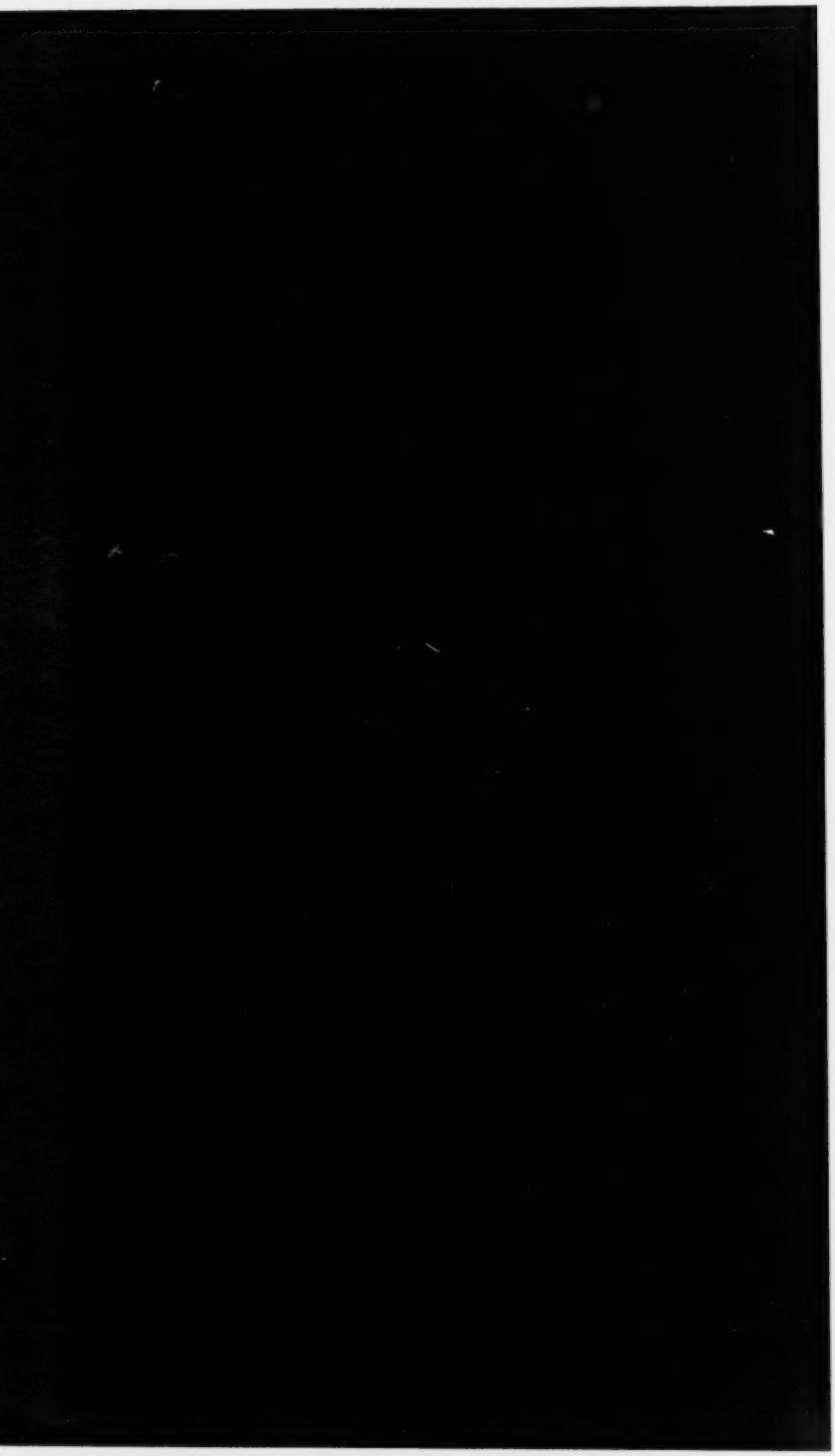

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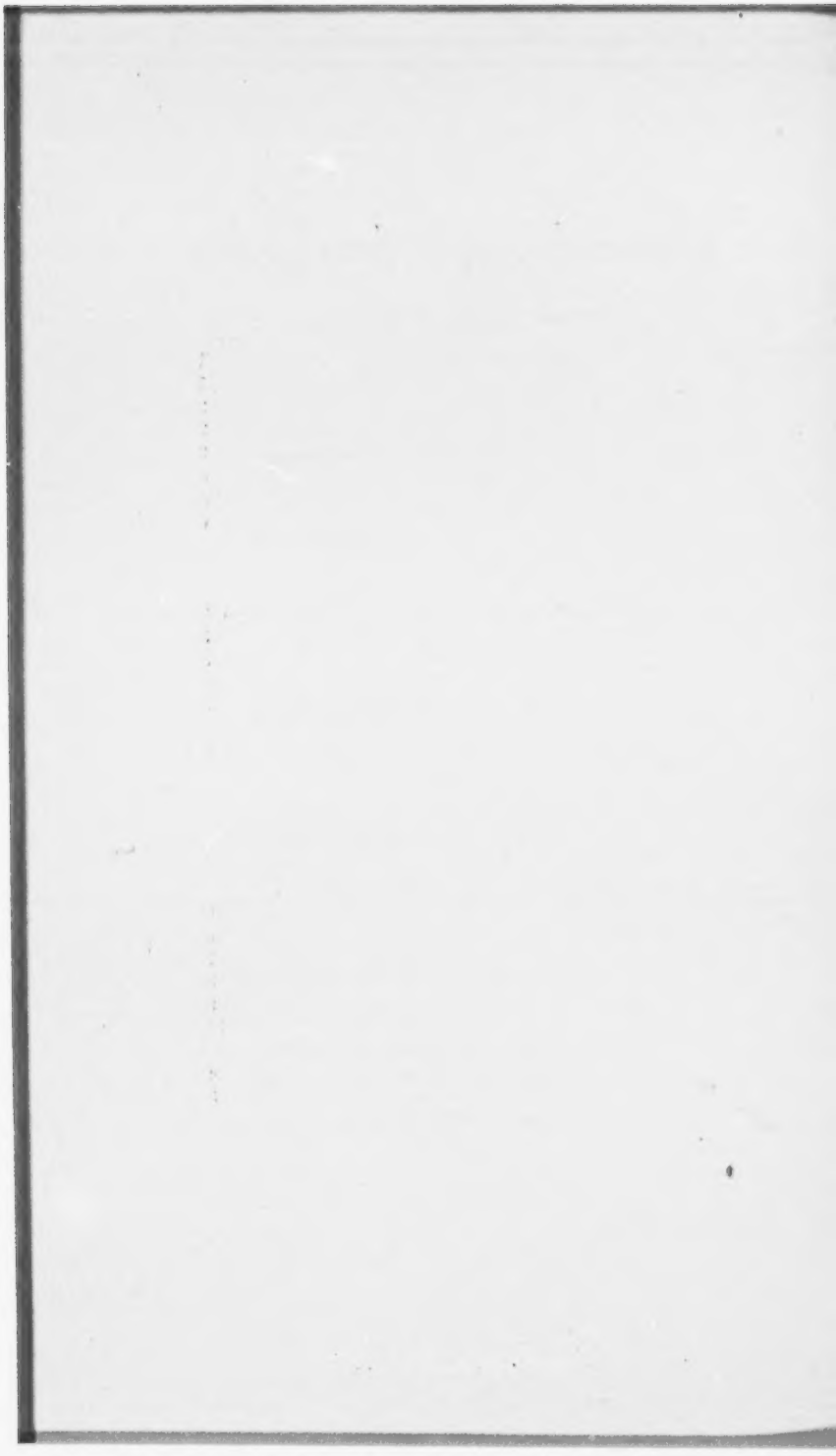

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 503

THOMAS L. "JACK" SPIERS, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 44–51) is not yet reported.[1]

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on August 29, 1945 and the order denying the petition for rehearing on Sept. 19, 1945 (R. 52, 54–5). The petition for a writ of certiorari was filed on October 11, 1945.

[1] This case was decided in a single opinion together with *Barnett* v. *Bowles*, now pending on petition for certiorari, No. 451, present Term.

Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App. Supp. IV, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., (herein sometimes termed "the Act") making applicable Section 204 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTION PRESENTED

Whether the Twenty-first Amendment to the United States Constitution precludes the application of a regulation establishing maximum prices for alcoholic beverages to sales made in contravention of state prohibitory legislation.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act appear in the appendix, *infra*, pp. 6–11. The maximum price regulation involved in this proceeding is printed in the Federal Register (8 F. R. 11161).

STATEMENT

Petitioner filed a protest with the Price Administrator pursuant to Section 203 (a) of the Act asserting that Maximum Price Regulation No. 445, a comprehensive regulation establishing nationwide maximum prices for distilled spirits and wines, was invalid as applied to sales in the State

of Mississippi (R. 1–4). Petitioner alleged that he was engaged in the business of selling alcoholic beverages in the State of Mississippi in violation of the State prohibition legislation (Miss. Code, Vol. II, Title II, Chap. 3), and asserted that the application of price control under the Act to such sales was in violation of the Twenty-first Amendment to the United States Constitution (R. 1, 3).[2] The protest was denied by the Price Administrator (R. 9–14), and petitioner thereupon filed a complaint with the United States Emergency Court of Appeals (R. 38). That court rejected petitioner's attack upon the constitutionality of the regulation and dismissed the complaint (R. 44–52). One judge dissented on statutory grounds not here urged.[3]

ARGUMENT

Petitioner's attack upon the regulation is premised upon the prohibition of the Twenty-first Amendment against the transportation or importation of intoxicating liquors into any state for delivery or use in the state in violation of its laws.[4] Petitioner appears to contend that this

[2] The protest also set forth objections to the maximum price regulation based upon the terms of the Emergency Price Control Act. These latter objections have not been urged in the petition.

[3] The statutory construction grounds, however, are relied upon by the petitioner in *Barnett* v. *Bowles*, No. 451.

[4] Section 2 of the Twenty-first Amendment provides as follows: "The transportation or importation into any State, Territory, or possession of the United States for delivery

provision imposes upon Congress the absolute duty to prevent the importation of intoxicating beverages into Mississippi, and that the right to establish war-time price control is in conflict with and must yield to the paramount obligation to bar the importation of liquor into the state (Pet. 10).

This contention, however, must fail for the lack of a showing that there is in fact any conflict between the asserted Congressional duty and the application to Mississippi of the nation-wide price regulation. Petitioner offered no evidence in support of this contention, nor does any such conflict appear as a matter of law from the face of the regulation and the applicable constitutional and statutory provisions. By the Liquor Enforcement Act of 1936 (49 Stat. 1928, 27 U. S. C. Sec. 221) Congress made it a federal offense to transport or import intoxicating liquors into states where sales of such liquors are prohibited. No evidence has been presented that this statute is not being fully enforced, or that enforcement is in any wise impeded by the maximum price regulation in question. In fact, as was found by the court below, enforcement of this regulation inevitably operates in aid of the state and federal laws which prohibit importation and sale of liquor in Mississippi by minimizing the inevitable tendency of sellers to market a scarce commodity in an area of uncontrolled prices (R. 5–6).

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or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The alternative argument that the Twenty-first Amendment has wholly withdrawn from the federal government authority to regulate intoxicating liquors (Pet. 8) has been decisively rejected. *United States* v. *Frankfort Distilleries,* 324 U. S. 293; *Jameson & Company* v. *Morgenthau,* 307 U. S. 171. This Court has likewise had occasion repeatedly to reject the suggestion that the illegality of an act under state law confers an immunity from federal legislation. *License Tax Cases,* 5 Wall. (72 U. S.) 462; *Wainer* v. *United States,* 299 U. S. 92; *United States* v. *Sullivan,* 274 U. S. 259; *United States* v. *One Ford Coupe Automobile,* 272 U. S. 321.

We submit that there is no substance to the suggestion that the maximum price regulation under attack in any wise conflicts with the provisions of the Twenty-first Amendment to the Constitution.

CONCLUSION

The case was rightly decided and does not warrant review.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.

RICHARD H. FIELD,
General Counsel,
Office of Price Administration.

NOVEMBER 1945.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., are as follows:

SEC. 2. (a) Whenever in the judgment of The Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.

SEC. 203. (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with

such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regula-

tion, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall

be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers

and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Terri-

torial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

U. S. GOVERNMENT PRINTING OFFICE: 1943